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Hart & Wechsler, *The Federal Courts & The Federal System* (1953) p. 609	38
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Rockefeller Brothers Fund Report, p. 7, *The Pursuit of Excellence: Education and the Future of America*	27

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 592

COCHEYSE J. GRIFFIN, ET AL., PETITIONERS

v.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the court of appeals (R. 209) is reported at 322 F. 2d 332. The opinions of the district court (R. 52, 70) are reported *sub nom. Allen* v. *County School Board* at 198 F. Supp. 497 and 207 F. Supp. 349.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1963 (R. 237). The petition for a writ of certiorari was granted by this Court on January 6, 1964 (R. 240). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The public schools of Prince Edward County, Virginia, have been effectively closed by the refusal of the county board of supervisors to levy the taxes necessary to produce the county's share of the cost of operating the schools, under a State "local option" scheme which condones such inaction. The county officials failed to raise funds because of their opposition to desegregation. At the same time, the State of Virginia operates a system of public schools, in large part with State funds, in all other counties of the State. And, while the public schools of Prince Edward County remained closed, the State and the county distributed educational tuition grants to school children, almost all of which have in fact been used in Prince Edward County for attendance at newly established "private" schools which follow a rigid policy of segregation. The county has, moreover, allowed full credit against local taxes for contributions made to the private schools.

On these facts, the questions presented are:

1. Whether the closing of the public schools of Prince Edward County by the combined action of State and local officials works a constitutionally impermissible discrimination by the State of Virginia against all the residents of the county, including the unconsenting Negro petitioners.

2. Whether the system of tuition grants and tax credits, as it operates in Prince Edward County, constitutes State support of segregation in education and thus works a constitutionally impermissible racial discrimination.

3. Whether the appropriate remedy is a decree enjoining the continued award of grants and credits while the public schools of the county remain closed, directly requiring the county supervisors to levy and appropriate the necessary initial school funds, and alternatively requiring the appropriate State officials to re-open the public schools of Prince Edward County while they maintain other public schools in the State.

INTEREST OF THE UNITED STATES

The effective implementation of this Court's decision in *Brown* v. *Board of Education*, 347 U.S. 483—which included the present case—is a matter of continuing national concern. The government has accordingly participated in the prior school cases which have come before this Court. The instant case is of general significance in that it is the first to involve—on plenary consideration—the constitutional propriety of closing all the public schools of a county to avoid desegregation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

Section 22–126 of the Code of Virginia (1950), as amended, provides:

> Each county, city and town if the town be a separate school district, is authorized to raise sums of money by a tax on all property, subject

to local taxation, at such rate as may be deemed sufficient, but in no event more than three dollars on the one hundred dollars of the assessed value of the property in any one year to be expended by the local school authorities in establishing, maintaining and operating such schools as in their judgment the public welfare requires and in payment of scholarships for the furtherance of elementary or secondary education and transportation costs as required or authorized by law; provided that in counties with a population of more than six thousand four hundred but less than six thousand five hundred, such rate may be increased to four dollars on the one hundred dollars of the assessed value of the property therein in any one year; and provided further that in counties having a population of more than thirty-seven thousand but less than thirty-nine thousand such rate may be increased to four dollars on the one hundred dollars of the assessed value of the property therein in any one year.

Section 22–116 of the Code of Virginia provides that:

> The fund applicable annually to the establishment, support and maintenance of public schools in the Commonwealth shall consist of:
>
> (1) State funds embracing the annual interest on the Library Fund; all appropriations made by the General Assembly for public school purposes; that portion of the capitation tax required by the Constitution to be paid into the State Treasury and not returnable to the localities, and, such State taxes as the General Assembly, from time to time, may order to be levied.

(2) Local funds embracing such appropriations as may be made by the board of supervisors of council for school purposes, or such funds as shall be raised by levy by the board of supervisors or council, either or both, as authorized by law, and donations or the income arising therefrom, or any other funds that may be set apart for local school purposes.

Section 22–117 of the Code of Virginia provides that:

> No state money shall be paid for the public schools in any county until evidence is filed with the State Board, signed by the Superintendent of Schools and the clerk of the board, certifying that the schools of the county have been kept in operation for at least nine months, or a less period satisfactory to the State board; provided, however, that no county shall be denied participation in State school funds, except as provided by law, when the board of the county has appropriated a fund equivalent to that which would have been produced by the levying of the minimum local school tax allowed by law, or has levied the maximum local school tax allowed by law, provided, such appropriation or levy is based on assessments not lower than the assessments on real and personal property in such counties in the year nineteen hundred and twenty-five.

STATEMENT

Twelve years ago, the original plaintiffs in this case filed a class action in the United States District Court for the Eastern District of Virginia to enjoin discrimination on account of race or color in the

assignment of students to the public schools in Prince Edward County, Virginia. The case reached this Court in *Brown* v. *Board of Education*, 347 U.S. 483, and (together with the other cases) was ultimately remanded to the district court with instructions to fashion a decree which would enable the Negro complainants to be admitted "to public schools on a racially nondiscriminatory basis with all deliberate speed." 349 U.S. 294. Notwithstanding numerous decisions of the lower federal courts and the State courts, the mandate of this Court has yet to be obeyed. That extraordinary history merits detailed recitation.

1. On May 3, 1956, the Board of Supervisors of Prince Edward County enacted a Resolution declaring its "policy and intention" not to levy taxes or appropriate funds for public schools "wherein white and colored children are taught together under any plan or arrangement whatsoever" (R. 50).

2. During the same year, 1956, the Virginia General Assembly, as a part of its "massive resistance" scheme, greatly expanded Virginia's tuition grant program for students attending private schools.[1] The legislature also amended, pursuant to "massive resist-

[1] The present tuition grant law (Va. Code § 22-115.30 *et seq.*), which makes such grants available to any child desiring to attend a bona fide private school, is the outgrowth of various changes in this legislation made in 1959 and 1960. The history of these and other pertinent Virginia statutes and constitutional provisions is set out in the Appendix, pp. 42–56, *infra*. For a more personal account of Virginia's reaction to the *Brown* decision, see *Virginia's Massive Resistance* by Benjamin Muse (Indiana University Press 1961).

ance," the Virginia Supplemental Retirement Act so as to include within its retirement benefits, theretofore restricted to public school teachers and other State employees, teachers in private elementary and secondary schools incorporated after December 29, 1956.

3. In 1957, the district court decided that the respondents were entitled to additional time in which to solve the desegregation problem. 149 F. Supp. 431 (E.D. Va.). The court of appeals reversed and remanded with directions to enter an order requiring a prompt and reasonable start toward desegregation. 249 F. 2d 462 (C.A. 4). The response of the district court was to authorize the postponement of desegregation until 1965. 164 F. Supp. 786. In May of 1959, the court of appeals again reversed (266 F. 2d 507), ordering the immediate desegregation of the county high schools and the preparation of a plan for the desegregation of the elementary schools "at the earliest practical day."[2]

4. On June 3, 1959, the Supervisors refused to levy any school taxes whatever for the coming school year. This decision was taken in light of the fact that the "School Board of this county is confronted with a court decree which requires the admission of white and colored children to all schools of the county without regard to race or color."[3] Hence,

[2] Eleven months later, the district court, in April of 1960, entered a desegregation order pursuant to the mandate of the court of appeals (R. 18-19). In the interim the public schools in Prince Edward County were closed (R. 54).

[3] See the statement of the Chairman of the Board of Supervisors, filed in the Board's Record Book, introduced as Plain-

the schools did not reopen in the Fall of 1959.[4] They have not reopened to this day.

5. The white citizens of Prince Edward County formed, and the State chartered, the "Prince Edward School Foundation" (T. 162)[5] which organized several elementary schools and two high schools and opened their doors in September 1959. T. 175.[6] Enrollment in these schools was restricted to white children. T. 233–234.[7] The Foundation schools operated in 1959–60 and 1960–61 on a regular basis for a complete school year and provided the normal instruction to be ex-

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tiff's Exhibit 1 at the July 1961 hearing in the district court, and reproduced as Appendix C to the Petition herein (pp. 1c–2c).

[4] As the Supreme Court of Virginia points out in *County School Board of Prince Edward County* v. *Griffin*, — Va. —, 133 S.E. 2d 565, 576, although the General Assembly is authorized to make such other appropriations (in excess of the constitutional minimum) as it may deem best, its practice has been to provide only "matching funds," after certain minimum funds have been appropriated by the county itself. The court further found that the "constitutional minimum" funds received by Prince Edward County (about $40,000) was "wholly insufficient for operating the public schools in that county." Thus the action of the Board of Supervisors was tantamount to closing the public schools.

[5] These are references to the transcript of the hearing in the district court on July 24–27, 1961. This two-volume transcript, not part of the printed record, has been filed in this Court. Substantially the same information is found in the memorandum opinion of the district court, dated August 23, 1961, at pages 58–60 of the printed record.

[6] The two high schools were consolidated for the 1960–61 school year. T. 175.

[7] A total of 1,376 white children attended the Foundation schools in 1960–61. T. 175.

pected in public schools. The high school is fully accredited by the State Board of Education.[8]

During the first year of its operation (1959–60) the Foundation was supported entirely by private contributions and donations. T. 178–179.[9] During its second year of operation the Foundation was financed primarily with public funds. On July 18, 1960, the County Board of Supervisors enacted an ordinance providing that "parents of children who are or will be enrolled during the school year * * * in a course of systematic educational instruction or training of not less than one hundred eighty days duration or the substantial equivalent thereof" are entitled to tuition grants of not less than $100.00. And, as earlier noted, under Va. Code § 22–115.30 each child was entitled to obtain a State scholarship in the sum of $125.00 for elementary pupils and $150.00 for high school pupils.[10]

Pursuant to the county ordinance and the State law, each child attending the Foundation's elementary schools in 1960–61 obtained $225.00 in public funds, and each Foundation high school child received

[8] Pursuant to the 1956 enactment of the General Assembly, the Foundation's teachers, almost all of whom taught in the white public schools in the preceding year, did not lose retirement benefits accrued while teaching in the public schools, and were eligible to—and most did—continue under the retirement plan. T. 213, 502 *et seq.*, 183–184.

[9] From June 4, 1959, to June 28, 1960, it received $334,712.22 by this means, and its expenses were $304,470.27, or a yearly cost per student of $216.09. T. 200.

[10] Apparently, even had the County failed to enact a tuition grant ordinance, under the state law each child would have been able to obtain $240.00 in any event. See Va. Code § 22–115.34. T. 145, 267.

$250.00 from the public treasury. In short, of the $332,144.11 the Foundation obtained in tuition in 1960–61, public funds accounted for approximately $311,400.[11]

On July 18, 1960, the County Board of Supervisors enacted an ordinance allowing a real and personal property tax credit—up to 25% of the tax bill—for contributions made to any "nonprofit, nonsectarian private school located within [the] County of Prince Edward" (R. 147). Tax credits claimed and granted by the County Treasurer pursuant to this ordinance, for the school year 1960–61 amounted to $56,866.22 (T. 146–147).[12]

6. While white students were thus furnished an education, primarily at the taxpayers' expense, Negro children received little education worthy of the name. The Prince Edward County Christian Association, organized in the Fall of 1959 (T. 347), operated ten "training centers" for Negro children[13] from February through May, 1960, and fifteen centers from

[11] In addition, the Foundation obtained from June 27, 1960, to July 20, 1961, donations to its "capital fund" totalling $181,787.30; to its library fund, from September 1, 1960, to June 8, 1961, amounts totalling $12,369.65 (T. 201); other donations totalling $6,855.90; and "other" receipts in the sum of $8,072.28. T. 200. Capital fund receipts were being used at the time of trial, to construct a new school building. T. 201.

[12] The President of the Foundation testified that it could and would continue to function even without this massive assistance from the public treasury. T. 236. It did in fact continue to do so after the district court cut off its sources of public revenue (as to which, see, *infra*, p. 12).

[13] These centers were available to either Negro or white children, but no white children attended. T. 371.

November, 1960 through May 1961: T. 340.[14] The quality of instruction given was "very inadequate." T. 414–415. See, also, T. 340, 341, 360, 376, 380, 424, 441. And the centers did not meet State standards for high school accreditation or for State tuition grants. T. 454, 458. While in 1958–59 some 1800 Negro children attended the County public schools, only 650 children enrolled at the "centers" during 1961, of whom 441 finished the full term. The cost of operating all of the centers during 1961 was only $11,000.[15]

7. In response to the closing of the public schools on September 16, 1960, petitioners, on April 24, 1961, filed supplemental and amended supplemental complaints, naming the County Board of Supervisors, the State Board of Education, the State Superintendent of Education and the County Treasurer as additional parties defendant. Petitioners sought to enjoin the defendants from "refusing to maintain and operate an efficient system of public free schools in Prince Edward County * * *", and challenged the State and county financial support for the Prince Edward School Foundation.

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[14] The centers were operated mainly for "morale building" purposes and were conducted from 10:00 A.M. until 1:30 P.M., five days per week.

[15] The leaders of the Prince Edward County Christian Association decided not to charge tuition and attempt to obtain county grants because "we were not really educating anybody" (T. 344) and because they considered the grants a circumvention of the desegregation order of the federal court. T. 364. In any event, it is clear on the face of the county tuition grant ordinance, as the district court subsequently found in its 1961 opinion (see *infra*), that the centers would not qualify under the terms of the ordinance without major improvements in program and facilities.

On August 25, 1961, the district court enjoined the allowance of tuition grants and tax credits "during such time [as] the public schools . . . remain closed. R. 62–63; 198 F. Supp. 497 (E.D. Va.).[16] However, the district court "abstained" on the question of whether the public schools could lawfully remain closed, suggesting that the issue be litigated in the Virginia courts. R. 58; 198 F. Supp. at 501.

8. In response to Judge Lewis' abstention order petitioners duly filed a petition for a writ of mandamus in the Supreme Court of Appeals of Virginia, seeking to compel the County Board of Supervisors "to appropriate and make available to the [County] School Board . . . sufficient funds for the operation and maintenance for the 1961–62 school year, and subsequent terms, of such public free schools as in the judgment of the School Board the public welfare requires." The Virginia Supreme Court of Appeals, construing the Virginia Constitution and statutes,[17] held that the Supervisors could not be compelled to do so. *Griffin v. Board of Supervisors of Prince Edward County,* 203 Va. 321, 124 S.E. 2d 227 (1962).

9. Petitioners returned to the district court but respondents urged the court to abstain again or to dismiss.

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[16] The reasoning of the district court was that the tax credits and county tuition grants amounted to a circumvention of the desegregation order, and that the State tuition grants were unavailable under State law while the public schools remained closed.

[17] The court stated that "The petitioners further point out in their brief that 'there are no Federal questions [involved] in this proceeding', and we perceive none." 203 Va. at 323.

Judge Lewis refused either to dismiss or to abstain.[18] Reaching the merits, the district court found that "* * * the Board of Supervisors * * * caused the closing of the public schools in the county in order to avoid the racial discrimination prohibited by the Supreme Court of the United States * * *," and held that the public schools may not remain closed (R. 73, 80; 207 F. Supp. at 351). The district court, however, refrained from entering an order requiring the schools to reopen by September 7, 1962 (R. 80–81).

10. Somewhat more than one month later, on August 31, 1962, the Board of Supervisors and the School Board instituted a suit for a declaratory judgment in the Circuit Court for the City of Richmond, naming certain of the petitioners as defendants. The suit sought resolution of various questions involved or alleged to be involved in the federal proceeding. Having at this late date instituted another suit in the state court, the respondents now sought to persuade Judge Lewis to abstain further to await its outcome. This he refused to do, and, on October 10, 1962, he entered an order which, insofar as relevant here, (1) denied further abstention; (2) held that the County schools may not remain closed, but (3) deferred the entry of "such further orders as may be necessary and proper to require full compliance with this decree pending review by the United States Court of Appeals for the

[18] He noted that counsel for the Board of Supervisors had given an assurance that he would file a suit if petitioners failed to do so, but that respondents had not filed an appropriate answer or countersuit with the state courts. He also noted that "counsel for all parties" advised him that "none of them intends to file another suit in the State courts."

Fourth Circuit and the Supreme Court of the United States, * * *" (R. 83, 86-87). Appeals and cross-appeals were duly filed.

11. After this case had been orally argued in the court below, the Circuit Court of Richmond entered its decision on March 21, 1963. It held that the closing of schools in Prince Edward County did not violate the State or Federal Constitution; that the system of tuition grants is not a scheme for evasion of the decision in *Brown* v. *Board of Education;* and that State tuition grants were available under State law notwithstanding the closing of the public schools. It also described the operation of the Virginia school laws.

12. On August 12, 1963, the court of appeals handed down the decision from which petitioners here seek review (R. 209). Noting that the decision of the Circuit Court of Richmond had been appealed and that the case was "ripe for decision" in the Supreme Court of Appeals of Virginia, the court held that (R. 213):

> * * * the District Court properly decided in the first instance, that it should abstain from deciding the merits of the principal issue [school closing] until the relevant questions of state law had been decided by the state courts. We think it should have adhered to its abstention when resolution of the state questions by state courts was delayed because the plaintiffs, themselves, chose to withdraw them from state court consideration. We think too that abstention on the other two issues [tuition grants and tax credits] where the answers are so closely

> related to the principal issue, was the proper course. Insofar as there are federal questions present which are independent of state law * * *, we conclude that the plaintiffs have shown no ground for relief, so that abstention is not inappropriate.[19]

On December 2, 1963, the Supreme Court of Virginia rendered its decision, holding that the Virginia Constitution compels neither the State nor the county to reopen the public schools in Prince Edward County, or to furnish funds for that purpose. *County School Board of Prince Edward County* v. *Griffin*, — Va. —, 133 S.E. 2d 565.[20]

On January 6, 1964, this Court granted certiorari, setting the case down for hearing "on the merits," stating in a *per curiam* opinion that it did so "in view of the long delay in the case since our decision in the *Brown* case and the importance of the questions presented." 375 U.S. 391, 392.

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[19] Judge Bell, dissenting, believed that the order of the district court was correct and should be implemented, for two reasons: (1) because "the public school system of Virginia is maintained, supported and administered on a statewide basis by * * * Virginia; therefore, the closure of the schools of this one county constitutes discrimination," and (2) "the defendants closed the schools solely in order to frustrate the orders of the federal courts that the schools be desegregated." Observing that "[t]he plaintiffs assert a federal right guaranteed by the Constitution," he said that the majority opinion amounted to "a humble acquiescence in outrageously dilatory tactics * * *," an "abnegation of our plain duty," and "a truly shocking example of the law's delays" (R. 229, 230, 236).

[20] The opinions in the case are reproduced in full as an Appendix to the government's Memorandum in support of the petition for certiorari herein, pp. 8–45. For the convenience of the Court, references to those opinions will cite both the Southeastern Reporter and our Memorandum.

ARGUMENT

INTRODUCTION AND SUMMARY

The fundamental question presented by this case is whether the Equal Protection Clause of the Fourteenth Amendment tolerates the result revealed here: the complete abandonment of public education in one county (while the State maintains a comprehensive system of free public schools elsewhere), combined with substantial contribution of public funds to nominally private schools which practice racial discrimination. So stated, the question seems to answer itself. Yet, no one disputes the factual premise. Rather, respondents' arguments begin with disclaimers of responsibility and end by erecting obstacles to effective relief. In brief, the suggestion is that the State itself closed no schools; that the county authorities practiced no discrimination within their limited jurisdiction; and that the policy of the schools now operating in Prince Edward County is their own private affair.

In our view, those distinctions do not avail. So saying, however, we charge no conspiracy between the various respondents among themselves, or with the operators of the segregated private schools of the county. Our argument does not depend on impugning the motives of the Virginia Legislature in enacting "local option" laws which permit any county to withhold school funds. Nor do we suggest that either the State or county officials have influenced the private Prince Edward School Foundation to practice segregation. Our conclusion flows from a belief that the constitutional mandate of Equal Pro-

tection forbids the State (and the county, also) to permit so gross a discrimination to be accomplished by official action and to subsist with the support of public funds.

We begin by noticing the obvious discrimination involved in the closing of the public schools of Prince Edward County, while the State, in large part with State funds, maintains a system of public education in all other counties (Point I). Here, of course, the inequality is suffered by all the residents of Prince Edward County, white and colored. But that hardly justifies the discrimination. Though many (presumably whites) have apparently acquiesced in the scheme, we assert that those who continue to claim their right to equal treatment at the hands of the State are entitled to have the public schools which the State provides elsewhere. Since it is clear that the State itself has not withdrawn from the field of education, the device of "local option" cannot be permitted to defeat the personal rights of the unwilling minority, especially when the purpose and effect of the local decision is to perpetuate racial discrimination.

We turn next to the public support of private schools through tuition grants, tax credits and a provision permitting public school teachers to serve there without losing State benefits (Point II). Far from alleviating the territorial discrimination already noticed, that support adds a further inequality by effectively perpetuating segregation. In context, we conclude, the system of grants and credits works an impermissible racial discrimination.

Finally, we address ourselves to the appropriate remedy (Point III). Plainly, the program of State support to segregated schools must cease, at least so long as the public schools remain closed. But that injunction alone cannot relieve the prevailing territorial discrimination. Nor would it, as a practical matter, erase the relative disadvantage of the Negro in a community without public schools. Accordingly, we believe the decree must effectively compel the reopening of the State public schools in Prince Edward County. The Eleventh Amendment, it seems to us, erects no bar against such relief. Not only may the county authorities be compelled to levy the necessary taxes, but the State officials, also, are properly amenable to an injunction which restrains continued discrimination against the school children of the county.

I

THE CLOSING OF THE PUBLIC SCHOOLS IN PRINCE EDWARD COUNTY WORKS AN IMPERMISSIBLE DISCRIMINATION AGAINST ALL THE RESIDENTS OF THE COUNTY, PARTICULARLY THE UNWILLING NEGRO POPULATION

We begin with two certainties: The first is the basic rule derived from the Equal Protection Clause of the Fourteenth Amendment that no State, without compelling justification, may withhold from some of its citizens educational benefits which it grants to all others; the second is the uncontested fact that nothing in the situation of Prince Edward County would justify such a direct discrimination against its inhabitants. So much is beyond dispute. The governing principle here is that "where the state has undertaken to provide it, [public education] is a right which must

be made available to all on equal terms." *Brown* v. *Board of Education,* 347 U.S. 483, 493. The benefit of the precept of course runs to everyone, no matter where he lives, regardless of race. Specifically, it bars the arbitrary denial of educational opportunities on the basis of residence. For, whatever the permissible scope of territorial distinctions in other matters,[21] "* * * it is clear enough that, absent a reasonable basis for so classifying, a State cannot close the public schools in one area while, at the same time, it maintains schools elsewhere, with public funds." *Hall* v. *St. Helena Parish School Board,* 197 F. Supp. 649, 656, (E.D. La.), affirmed, 368 U.S. 515. See, also, *Bush* v. *Orleans Parish School Board,* 187 F. Supp. 42, 188 F. Supp. 916 (E.D. La.), affirmed, 365 U.S. 569; *Aaron* v. *McKinley,* 173 F. Supp. 944 (E.D. Ark.), affirmed *sub nom. Faubus* v. *Aaron,* 361 U.S. 917; *James* v. *Almond,* 170 F. Supp. 331 (E.D. Va.),

[21] For permissible geographic classification, see, *e.g.*, *McGowan* v. *Maryland*, 366 U.S. 420 (Sunday closing law); *Salsburg* v. *Maryland*, 346 U.S. 545 (rules of evidence); *Radice* v. *New York*, 264 U.S. 292 (night restaurant employment for women); *Packard* v. *Benton*, 264 U.S. 140 (security required of carriers for hire); *Ocampo* v. *United States*, 234 U.S. 91 (right to preliminary examination); *Toyata* v. *Hawaii*, 226 U.S. 184 (license fee for auctioneers); *Gardner* v. *Michigan*, 199 U.S. 325 (jury selection procedures); *Mallett* v. *North Carolina*, 181 U.S. 589 (appeal procedures); *Mason* v. *Missouri*, 179 U.S. 328 (election laws); *Chappell Chemical & Fertilizer Co.* v. *Sulphur Mines Co. (No. 3)*, 172 U.S. 474 (jury trial rules); *Budd* v. *New York*, 143 U.S. 517 (maximum charges by grain elevators); *Hayes* v. *Missouri*, 120 U.S. 687 (number of peremptory challenges); *Missouri* v. *Lewis*, 101 U.S. 22 (appeal procedures).

On the other hand, forbidden territorial discriminations are illustrated by the recent decision in *Gray* v. *Sanders*, 372 U.S. 368.

appeal dismissed per stipulation, 359 U.S. 1006; *Duckworth* v. *James*, 267 F. 2d 224 (C.A. 4), certiorari denied, 361 U.S. 835. Since there is, of course, no concealing the fact that the public schools of Prince Edward County were closed for the sole purpose of avoiding outstanding desegregation orders, it would seem to follow that the unjustifiable discrimination against the residents of the county must be corrected.

In answer, the State makes two representations. The central State officials insist that the closing of the Prince Edward schools was not their doing, but resulted from a purely local decision to discontinue the school tax. And they add that, in any event, they are now powerless, as a matter of State law, to require the re-opening of those schools or to furnish funds for that purpose until and unless the county authorities reverse their decision and provide the initial moneys. The same arguments, of course, are not open to the local county respondents, who made the deliberate choice to close their public schools and have plain power to reopen them. But, for their part, they say they are guilty of no discrimination, having shut all the county schools and having no control over the expenditure of public funds for schools outside their jurisdiction. Thus, all the respondents disclaim responsibility for the existing discrimination in the distribution of State educational benefits.

We do not agree. The fundamental guarantee of equal treatment at the hands of the State cannot be thwarted by the fragmentation of decisionmaking. In principle, the Fourteenth Amendment speaks to the State and enjoins it from discriminating against "any

person within its jurisdiction." Doubtless, when the matter is wholly local, the injunction runs only against the municipality or subdivision concerned. See, *e.g.*, *Tonkins* v. *Greensboro*, 276 F. 2d 890 (C.A. 4); *City of Montgomery, Alabama* v. *Gilmore*, 277 F. 2d 365 (C.A. 5). But in the usual case, the constitutional obligation binds the State itself and it cannot be avoided by delegating to others the power to make the discriminatory decision. So long as the State remains involved, no abdication of authority will avail, even when power is transferred to private hands. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725; *Cooper* v. *Aaron*, 358 U.S. 1, 19. Cf. *Terry* v. *Adams*, 345 U.S. 461. *A fortiori*, the State cannot insulate itself from responsibility for a decision which results in individious discrimination by a surrender in favor of its own political subdivisions. That would be like permitting the principal to escape liability by appointing agents. Nor does it matter if the local majority indicate a willingness to forego the benefit of the Equal Protection Clause. "One's right to life, liberty and property * * * and other fundamental rights may not be submitted to the vote; they depend on the outcome of no elections." *Board of Education* v. *Barnette*, 319 U.S. 624, 638. See *Boson* v. *Rippy*, 285 F. 2d 43, 45 (C.A. 5). As this Court said in another context, "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co.* v. *Railroad Commission of California*, 271 U.S. 583, 594.

The cases dealing with "local option" do not sustain the respondent's position for they are not inconsistent with the principle that the Equal Protection Clause bars a State from introducing irrational territorial classification, whether it acts through one legislature or several political subdivisions. The ultimate question is always whether the State has engaged in arbitrary or capricious discrimination. Not all territorial distinctions are reasonable, albeit in many areas there is very broad discretion because geographical classifications are seldom invidious and local conditions may usually be presumed to justify divergencies in police regulations. Whether a given territorial distinction is reasonable, or arbitrary or capricious, depends upon a number of factors.

One question is whether the territorial classification reflects differences in local conditions that are relevant to the subject matter of the discrimination. Physical or economic environment might justify differences in laws pertaining to noise, smoke or the keeping of animals, but it would not support giving the vote to citizens who had reached the age of 18 in one city while denying it to those under 25 in another. Local conditions may explain variations in the organization and procedure of the courts[22] but they could hardly justify entirely disallowing appeals in criminal cases in urban areas while permitting them in the country.

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[22] See, *e.g.*, *Missouri* v. *Lewis*, 101 U.S. 22; *Hayes* v. *Missouri*, 120 U.S. 687; *Gardner* v. *Michigan*, 199 U.S. 325; *Salsburg* v. *Maryland*, 346 U.S. 545.

Second, there are subjects upon which the attitude of the local community may furnish a reasonable ground for classification, partly because local mores are relevant legislative considerations in exercising the police power in sundry areas such as those involving views of public morality, for example, horse racing and the closing of business establishments on Sunday, and partly, perhaps, because of an interest in local rule. Thus, the Court has steadfastly refused to review a locality's decision to permit or prohibit the sale of intoxicating liquor. *Rippey* v. *Texas*, 193 U.S. 504; *Ohio* v. *Dollison*, 194 U.S. 445.[23] Valid local option laws often bring togther the first and second considerations; that is to say, the decision of the local subdivision will not only reflect a determination by those most familiar with the facts concerning the existence of local conditions supporting one classification or another, but it will also be an expression of local attitudes and an exercise of local self-rule.

Third, the subject matter of the discrimination is of particular relevance.[24] This is a familiar principle

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[23] Cf. *Ft. Smith Light Co.* v. *Pacing Co.*, 274 U.S. 387, 391; *Salsburg* v. *Maryland*, 346 U.S. 545, 552; *McGowan* v. *Maryland*, *supra*, 366 U.S. at 537, n. 138 (concurring opinion of Mr. Justice Frankfurter).

[24] Thus, there are decisions of state courts invalidating local option laws on the ground that the matter involved is too important to permit of variations among counties. See *In Re Municipal Suffrage to Women*, 160 Mass. 586, 36 N.E. 488, 490, *Opinion of the Justices*, 328 Mass. 674, 105 N.E. 2d 565; *Hobbs* v. *Lawrence County*, 193 Tenn. 608, 247 S.W. 2d 73; compare *State* v. *Neveau*, 237 Wisc. 85, 294 N.W. 796, 804; cf. *Wright* v. *Cunningham*, 115 Tenn. 445, 91 S.W. 293. See, also, Cooley, *Constitutional Limitations* (7th ed.) 172-173, 174.

in the application of the Equal Protection Clause, which is no less relevant in respect to geographical classification. Minor differences that will support differentiations in police regulation, taxation and economic legislation [25] may be wholly inadequate to justify discrimination in respect to more fundamental human rights. Thus, the technical distinctions between larceny and embezzlement may support differences in criminal procedure and sentencing, but would not justify sterilization in the case of one type of offender and not in the case of the other. *Skinner* v. *Oklahoma,* 316 U.S. 535. A State may favor rural areas in its tax or regulatory legislation, but equal protection forbids favoritism in weighting the votes for State-wide officials. *Gray* v. *Sanders,* 372 U.S. 368. By the same reasoning the interest in local self-rule, especially if coupled with differences in attitudes and conditions, will doubtless support geographical distinctions in such matters as zoning ordinances and licensing laws. But deference to local conditions and preferences could hardly justify geographical classifications with respect to the defendant's right to some form of appeal in criminal cases or the availability of a transcript for paupers. Cf. *Draper* v. *Washington,* 372 U.S. 487; *Griffin* v. *Illinois,* 351 U.S. 12.

The foregoing analysis is sustained by the decisions of this Court. In passing upon legislation creating

[25] See, *e.g.*, *Budd* v. *New York*, 143 U.S. 517; *Toyata* v. *Hawaii*, 226 U.S. 184; *Packard* v. *Benton*, 264 U.S. 140; *Radice* v. *New York*, 264 U.S. 292; *McGowan* v. *Maryland*, 366 U.S. 420.

territorial differences within a State the Court has quite uniformly assumed that the discrimination must have a rational basis in local conditions. *E.g., Fort Smith Light Co.* v. *Paving District,* 274 U.S. 387; *Salsburg* v. *Maryland,* 346 U.S. 545; *McGowan* v. *Maryland,* 366 U.S. 426.[26] The cases also recognize that the division of governmental power between a State and its subdivisions is largely irrelevant in determining whether there is a denial of equal protection of the law. Thus, the Court has repeatedly reasoned that any classifications which may be drawn through local option may also be provided by the legislature. *E.g., Fort Smith Light Co.* v. *Paving District,* 274 U.S. 387, 391; *Salsburg* v. *Maryland,* 346 U.S. 545, 552; *McGowan* v. *Maryland,* 366 U.S. 426, 537, n. 138 (concurring opinion of Mr. Justice Frankfurter). Since the State itself may make only rational geographical differentiations, it would seem to follow that the interest in local self-government will not support a discrimination that could not constitutionally be made by the legislature itself. We need not press the point so far, however. For present

[26] State courts have struck down territorial distinctions lacking rational basis as violating the Equal Protection Clause. See, *e.g., Commissioner* v. *Ladutko,* 256 App. Div. 775, 777, 11 N.Y.S. 2d 747 (1st Dep't), affirmed per curiam, 281 N.Y. 655, 22 N.E. 2d 484; *Commissioner* v. *Torres,* 263 App. Div. 19, 31 N.Y.S. 2d 101 (1st Dep't); *The Fronton, Inc.* v. *Florida State Racing Commission,* 82 S.E. 2d 520, 523 (Fla.); see, also, *State* v. *Harris,* 216 N.C. 746, 753, 6 S.E. 2d 854; *State* v. *Neveau,* 237 Wisc. 85, 294 N.W. 796; *Chapel* v. *Commonwealth,* 197 Va. 406, 89 S.E. 2d 337, 343. Cf. *People ex rel. Adamowski* v. *Wilson,* 20 Ill. 2d 605, 170 N.E. 2d 605, 612–613 (Schaefer, C.J.).

purposes it is enough that local option does not render valid a discrimination that finds no rational justification even in the interest in local self-rule.

Judged by these criteria the geographical discrimination between children in Prince Edward County and children in other parts of Virginia in relation to primary and secondary school education is utterly irrational. No one even suggests that there are local differences in the physical environment or the local economy that affect the need for, or the value of, education or even the ability of the county to afford it. One can conceive of local social and economic characteristics that might justify a distinction as to the character of the education offered in the higher grades, whether to emphasize the mechanical trades or liberal arts for example, but none are relevant to the need for *some education.*[27]

Education (perhaps as distinguished from the character of education) cannot be fairly likened to the traditional subjects of local option on which local attitudes, mores and customs are relevant in a pluralistic society. The interest in local self-government is plainly insufficient to justify a State in discriminating among its children by providing some with an education and others with none. Equality of opportunity to obtain a basic education is too fundamental [28] to be

[27] It is perfectly clear that an offer to provide tuition grants if private schools are organized is not the equivalent of a public education. Cf. *Missouri ex rel. Gaines* v. *Canada*, 305 U.S. 337; see, also, the opinion of the court below, 322 F. 2d at 336.

[28] See *Brown* v. *Board of Education*, 347 U.S. 483, where this Court said (at 493):

> [Education] * * * is a principal instrument in awakening the child to cultural values, in preparing him for later

outweighed by local preferences. That is the universal view, absent massive resistance to desegration. In all fifty States, provisions for free public education are included in the constitution and general statutes. No State remains altogether indifferent to what the localities do. Thus, in a decision requiring a local community to levy taxes for school purposes, *City of Louisville* v. *Commonwealth for School Board,* 134 Ky. 488, 492–493, 121 S.W. 411, the Kentucky Court of Appeals said:

> * * * education is not a subject pertaining alone, or pertaining essentially, to a municipal corporation. Whilst public education in this country is now deemed a public duty in every State, * * * it has never been looked upon as being at all a matter of local concern only * * *. In this State the subject of public education has always been regarded and treated as a matter of State concern.

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professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Accord: *Grant* v. *Michaels*, 94 Mont. 452, 23 P. 2d 266, 271; *Piper* v. *Big Pine School District*, 193 Cal. 664, 226 Pac. 926, 930. There is no doubt but that a person's ability to secure remunerative employment and hence his relative income level are a function of his educational attainments. See, *e.g.*, *Department of Commerce, Statistical Abstract of the United States*, 1960, p. 110; cf. *The Pursuit of Excellence: Education and the Future of America*, Rockefeller Brothers Fund Report, p. 7. "Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his schoolwork." *Grant* v. *Michaels*, *supra*.

Similar rulings are to be found in most jurisdictions. See, *e.g.*, *Malone* v. *Hayden*, 329 Pa. 213, 197 Atl. 344, 352; *Bissel* v. *Harison*, 65 Conn. 183, 32 Atl. 348, 349; *People ex rel. Nelson* v. *Jackson Highland Bldg. Corp.*, 400 Ill. 353, 81 N.W. 2d 578; *Grant* v. *Michaels*, 94 Mont. 452, 23 P. 2d 266; *County Board* v. *Board of Commissioners*, 201 Ga. 815, 41 S.E. 2d 398; *Hobbs* v. *Lawrence County*, 193 Tenn. 608, 247 S.W. 2d 73, 76 (dictum); *Moseley* v. *Welch*, 209 S.C. 19, 39 S.E. 2d 133, 140; *Duncan* v. *People ex rel. Moses*, 89 Colo. 149, 299 Pac. 1060; *Fiscal Court* v. *Board of Education*, 294 Ky. 758, 172 S.W. 2d 624; *Mayor & City Council* v. *State ex rel. Du Pont*, 44 Del. 332, 57 A. 2d 70; *Posey* v. *Board of Education*, 199 N.C. 306, 154 S.E. 393; *Franklin* v. *Hinds*, 101 N.H. 344, 345, 143 A. 2d 111. See, also, the opinions of the Louisiana courts recited in *Hall* v. *St. Helena Parish School Board, supra*, 197 F. Supp. at 657.

Virginia herself does not treat primary and secondary education as truly a matter for local option. There is not the slightest doubt that the public school system in Virginia for a century has been, and remains, a *State* system. The current statutes detailed in the Appendix, *infra*, pp. 44–46, 53, 55–56, make that plain. Nor does the recent decision of the Virginia Supreme Court of Appeals cloud that conclusion. On the contrary, it is there expressly stated that "the local school boards are * * * agencies of the State." *County School Board of Prince Edward County* v. *Griffin, supra*, 133 S.E. 2d 565, 577 (Memo. 30). Moreover, the central State authorities set the standards and retain important functions of supervision and

administration. And State funds today provide about half the cost of running the schools. See Appendix, *infra*, pp. 55–56. This is not truly self-government of public education but a local determination whether the children of Prince Edward County are to have equal educational opportunities—equal not only in respect to race but also equal to those offered other Virginia children. The interest in local self-government upon such a question is not enough, assuming it to be otherwise relevant, to justify discrimination among children whose situation and need for education is the same. The geographical classification, being utterly irrational under all the circumstances, violates the Fourteeth Amendment.

The discrimination in the present case may be held to be a denial of equal protection upon narrower grounds. Fairly analyzed, what Virginia has done is to refer to county officials the decision whether to comply with the Equal Protection Clause and desegregate the public schools or to attempt to circumvent the constitutional requirement by substituting a segregated system of so-called "private schools" taught by State-aided teachers with the financial backing of tax credits and State tuition grants. At a minimum, the State must be held responsible for ensuring that the choice of a locality not to have schools is not exercised for a completely arbitrary or impermissible reason.

The only difference between Prince Edward County and other parts of Virginia is that many of the people of Prince Edward County (or at least their representatives) reject the idea of desegregated ed-

ucation. As the Court said in *Brown* v. *Board of Education*, 349 U.S. 294, 300, "the vitality of * * * constitutional principles cannot be allowed to yield simply because of disagreement with them." The will to deny equality to Negro children in order to preserve segregation will not support a geographical classification. Resting as it does upon a purpose to perpetuate an invidious discrimination, the closing of the public schools in Prince Edward County violates the Equal Protection Clause of the Fourteenth Amendment. Cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339.

Our quarrel is not with the distribution of power between the State and its subdivisions either in raising taxes or in administering the school system. Our submission is that from the constitutional viewpoint it is irrelevant how the power is actually distributed. Any distribution is constitutional so long as no grievous discrimination in educational opportunities results. If there is discrimination, the distribution will not save it. A State which maintains and supervises a public school system, either through the State government or local subdivisions, or some mixture of the two, cannot permit the residents of one county to be denied equal treatment with others. Virginia has not discharged her constitutional duty by abdicating decision. So long as there are some in Prince Edward County who wish the schools the State operates elsewhere, they are entitled to be satisfied. Whether it is appropriate to hold the county authorities accountable as "successors," or to require direct compliance from the State is a question of remedy. See *infra*, p. 35ff. In either event, Virginia

must respond. As Virginia's Chief Justice said, "in its final analysis, the default is a default of the State." *County School Board of Prince Edward County, Virginia* v. *Griffin, supra,* 133 S.E. 2d at 584 (Memo. 45) (Eggleston, C.J., dissenting).

II

THE PUBLIC SUPPORT OF PRIVATE SEGREGATED SCHOOLS IN PRINCE EDWARD COUNTY WORKS AN IMPERMISSIBLE DISCRIMINATION AGAINST NEGRO RESIDENTS OF THE COUNTY

The previous discussion yields the conclusion that the closing of the public schools in Prince Edward County works an unjust discrimination against all the unwilling residents of the county, even if the factor of race were not involved. So far as we are aware, there is no pretense that this inequality is corrected by the availability of State or local educational tuition grants, good for attendance at non-sectarian private schools within the county, or public schools outside. Nor could there be, since the grants are available throughout the State, as a supplement to, not a substitute for, a system of State-operated schools.[29] Indeed, far from remedying the inequality, the Virginia system of tuition grants, combined with important other support of segregated private schools in Prince Edward County, actually aggravates the discrimination against some of the residents of the county—specifically, the Negro school children. Thus, racial discrimination is added to the territorial discrimination.

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[29] See *County School Board Board of Prince Edward County* v. *Griffin, supra,* 133 S.E. 2d at 578–579 (Memo. 32–34); Code of Va. (1962 Supp.), §§ 22–115.29 through 22–115.35, recited in the Appendix, *infra,* pp. 52–55.

1. It is admitted, we suppose, that the emergence of the Prince Edward School Foundation, whose schools most of the white students of the county have attended since 1959,[30] was the inevitable consequence of closing the public schools in the area. So, also, it might have been anticipated that the Negro community, to the extent of their more limited means, would establish "private" schools for their children. But, given the temper of the times, it was plain the new white schools would not admit Negro students unless legally compelled to do so. Thus, it is fair to say that the closing of the public schools, of itself, decreed a perpetuation of segregation.

That fact alone may condemn the *status quo* in Prince Edward County. For it is clear that the State legislature paved the way for this result by increasing local option[31] and that the county supervisors took their action with the express purpose of defeating the opportunity of Negro children to attend desegregated schools.[32] Such action, taken for such a motive,

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[30] For the 1960–61 school term some 1,332 applications for state grants were filed, and 1,363 applications for local grants (T. 113, 127–128, 237) of which all but five were for attendance at the Foundation Schools (T. 130, 136). During the same year the Foundation schools had 1,376 pupils (T. 175). During the 1958–59 school year approximately 1,500 white children had been enrolled in the public schools of the county (T. 255, 305).

[31] Prior to the "massive resistance" legislation of 1956, the county supervisors were given wide discretion as to *how much* to provide for schools, but they were required to levy a minimum school tax, which the local electorate, by referendum, could increase. See Va. Code 1950, § 22–126. Both the statutory minimum and the referendum provision were deleted in 1956. See Appendix, *infra*, n. 5, pp. 49–50.

[32] See Statement, *supra*, p. 617.

and leading inexorably to the destruction of the right to attend public schools on an equal basis, may well run afoul of the constitution. See *Gomillion* v. *Lightfoot*, 364 U.S. 339, and cases there cited.

2. But we do not rest our argument there. Whatever the propriety of a total State withdrawal from the business of education to avoid the constitutional prohibition against public discrimination on account of race—assuming no resulting territorial discrimination—it is clear the State cannot, in any guise, continue to support racial discrimination in education. "State support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron* 358 U.S. 1, 19; see, also, *id.* at 4. Virginia has violated that injunction.

The proof is overwhelming. At the outset, we notice the State and local tuition grants. On their face, of course, the grants are good for any nonsectarian private school, white, Negro, or mixed. But there is no disguising the fact that there were no nonreligious desegregated private schools in Prince Edward County (T. 56–57, 72–73), and none likely to be established.[33] The net of it, then, is that the grants are

[33] The "training centers" operated by the Prince Edward County Christian Association during a part of the period were at best makeshift schools, apparently ineligible for tuition grants. In any event, though they were theoretically open to both races, only Negroes in fact attended. See Statement, *supra* pp. 10–11. The Prince Edward Free School, inaugurated in the Fall of 1963, is a stopgap arrangement scheduled to continue for only one year. Only eight white students attend.

"one-way tickets," good only for entry to segregated schools. See *Goss* v. *Board of Education,* 373 U.S. 683, 687. That is, of course, how they have in fact been used: For the school year 1960–61, of 1,363 tuition grants awarded to Prince Edward County school children, all but five were for attendance at the all-white Prince Edward School Foundation schools (R. 189).

This statistic highlights another consideration. While the grants have since ceased under the district court's injunction, it is plain they facilitated the creation and operation of the Foundation schools.[34] Moreover, the State facilitated the establishment of the new schools in another important respect. As part of the "massive resistance" legislation of 1956, Virginia permitted public school teachers to transfer to newly-organized private schools while remaining within the retirement system and retaining benefits accrued while teaching in the public schools. It would be difficult, we think, to exaggerate the boon thus conferred on the Foundation, now enabled to compete for the local white teachers with public schools in the adjacent areas.

[34] Of course, the effect of the tuition grant support cannot be obfuscated by claiming the funds go to the pupil, not the school. The Virginia Supreme Court of Appeals squarely rejected just such an argument in *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851, where it invalidated tuition grants to private school pupils prior to a 1956 Amendment to the Virginia Constitution authorizing such grants. And, in its order granting certiorari in this case, this Court recognized the facts by stating that "* * * the Prince Edward Foundation * * * has received state support." 375 U.S. 391. As *Almond* v. *Day* held, unlike such matters as school bus transportation, cf. *Everson* v. *Board of Education*, 330 U.S. 1, tuition grants are the "very life blood" of a school.

Nor is this all. As we have noted, Prince Edward County also accorded full credit against local taxes for contributions to the white Foundation. This, of course, is no ordinary exemption for "charitable" gifts, but an unusual, and direct, contribution by the county to the schools. In 1960–61, the benefit amounted to $56,000.

In sum, the State and county have given significant support to private schools, which—whether or not officially encouraged to do so—practice racial discrimination. Such support plainly runs afoul of the Constitution when, in a given community, it constitutes the only link between the State and education, committing all available public funds and the entire weight of official aid in the single direction of perpetuated school segregation. *Cooper* v. *Aaron, supra,* is dispositive on this point. See, also, *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715; *Simkins* v. *Moses H. Cone Hospital,* 323 F. 2d 959 (C.A. 4), certiorari denied, No. 776, this Term, March 2, 1964. Thus, the district court correctly enjoined continued State support of the Prince Edward School Foundation through tuition grants and tax credits, at least until the public school system was re-established in Prince Edward County.

III

THE APPROPRIATE REMEDY FOR THE ELIMINATION OF THE TERRITORIAL AND RACIAL DISCRIMINATION IS THE REOPENING OF THE PUBLIC SCHOOLS OF PRINCE EDWARD COUNTY

There can be no serious dispute over the propriety of enjoining further support of segregated schools with public funds. At least so long as the public

schools of Prince Edward County remain closed, the State and the county must be prevented from making tuition grants or according tax credits which can only perpetuate racial discrimination in education.

However, a decree so framed will not end the gross discrimination which the petitioners suffer as residents of Prince Edward County: they would still continue to be deprived of the public schools which all other citizens of Virginia enjoy. Plainly, the only adequate remedy is a reopening of the public schools in the county, unless Virginia wishes to withdraw altogether from the provision of education throughout the State. That was the decision of the district court and we think it was clearly correct.

1. The mechanics of the remedy need not detain us long. In our view, Virginia is constitutionally obligated to provide the same public schools for the children of Prince Edward County as it provides elsewhere. Since we deal with a State-regulated system largely supported by State revenues, the duty attaches to the State itself and cannot be shifted to local officials. Accordingly, it might be sufficient to address a decree to the proper State officials requiring them to eliminate the existing discrimination. Indeed, there is little doubt that the State respondents, so enjoined, would find the means to re-open the public schools of Prince Edward County.[35]

[35] While the present parties apparently lack authority to allocate funds for this purpose, it is clear the Virginia General Assembly, without regard to the availability of county tax monies, may appropriate the necessary funds. See *County School Board of Prince Edward County* v. *Griffin*, *supra*, 133 S.E. 2d at 578 (Memo. 31).

But, while we urge the entry of such a general decree, it seems to us appropriate, also, to recognize the scheme of State law which places a part of the financial burden for the operation of the public schools on the county and empowers the local supervisors to levy taxes for that purpose. The discretion they enjoy under present law—improperly delegated, as we think—cannot defeat the petitioners' claim. They are, in this respect, the successors to the State's obligation. But there is no reason to ignore their existence. See *Labile* v. *Watson*, 116 U.S. 289. Thus, the judgment should also compel the Board of Supervisors of Prince Edward County to collect and appropriate the necessary initial funds for school purposes.

2. It is argued, however, that the courts of the United States lack power to grant such "affirmative" relief against the State at the suit of private citizens. The Eleventh Amendment, it is said, stands in the way. Accordingly, we proceed to examine the supposed obstacle.

At the outset, it is clear that neither the Eleventh Amendment nor any other rule prevents a decree against the Board of Supervisors of Prince Edward County. It is well settled that counties do not enjoy the State's immunity from private suits in the federal courts. *Lincoln County* v. *Luning*, 133 U.S. 529; *Cowles* v. *Mercer County*, 7 Wall. 118; *Chicot County* v. *Sherwood*, 148 U.S. 529; *Kennecott Copper Corp.* v. *State Tax Comm.*, 327 U.S. 573, 579.[36] And that

[36] See, also, *Cooper* v. *Westchester County*, 42 F. Supp. 1, 3 (S.D.N.Y.) ("The immunity defined in the 11th Amendment * * * has been held not to extend to counties of a State * * *.");

principle is fully applicable here since a judgment against the Supervisors would reach them alone, without compelling the expenditure of State funds or other State action. Compare *Hopkins* v. *Clemson*, 221 U.S. 630.

Nor is there any inhibition to a form of decree which expressly directs the county authorities to levy necessary taxes. Having plain power to do so (Virginia Constitution, § 136; Va. Code 1950, § 22–126 (1962 Supp.)), the Supervisors may be compelled to assess and collect the needed funds. *Labette County Commissioners* v. *Moulton*, 112 U.S. 217; *Graham* v. *Folsom*, 200 U.S. 248 (1906); *Supervisors* v. *United States*, 4 Wall. 435; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *City of Galena* v. *Amy*, 5 Wall. 705; *Riggs* v. *Johnson County*, 6 Wall. 166; *Walkley* v. *City of Muscatine*, 6 Wall. 481; *Cherokee County* v. *Wilson*, 109 U.S. 621. See *Virginia* v. *West Virginia*, 246 U.S. 565, 594.[37] Indeed, a purported withdrawal of the power of taxation would not excuse performance. *Mobile* v. *Watson*, 116 U.S. 289. And, finally, it is no defense that the county supervisors,

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City of Memphis v. *Ingram*, 195 F. 2d 338 (C.A. 8); *Dunnuck* v. *Kansas State Highway Comm.*, 21 F. Supp. 882, 883. (D. Kan.) ("Counties * * * [are] not entitled to the immunity"); *McCreery Engineering Co.* v. *Massachusetts Fan Co.*, 195 Fed. 498, 505 (C.A. 1); Hart & Wechsler, *The Federal Courts & The Federal System* (1953) p. 609.

[37] See, also, *Bush* v. *Orleans Parish School Board*, 190 F. Supp. 861 (E.D. La.), affirmed, 365 U.S. 569, in which the court granted the school board's prayer to compel the City of New Orleans, "as tax collector for the Board * * * to remit to the Board the taxes so collected as required by law." 190 F. Supp. at 866.

as a matter of State law, enjoy a discretion which exempts them from mandamus. See *Griffin* v. *Board of Supervisors of Prince Edward County*, 203 Va. 321, 124 S.E. 2d 227. That contention was set to rest by this Court's decision in *City of Galena* v. *Amy*, 5 Wall. 705. See, also, *Virginia* v. *West Virginia*, *supra*; *Baker* v. *Carr*, 369 U.S. 186, 236.

3. It may well be that the proper State officers, in Richmond and Prince Edward County, will furnish the additional funds and take all other necessary measures to reopen the public schools of Prince Edward once the county supervisors have supplied the initial tax monies for that purpose. But, as we have already noted, the State's obligation, from the constitutional viewpoint, is in no sense dependent on the prior action of the county officials. Accordingly, it is proper that the decree expressly bind the State respondents, the State Board of Education and the State Superintendent of Schools.

Plainly, these officials enjoy no immunity from suit. Insofar as they are enjoined from continuing a discrimination that violates the Fourteenth Amendment, the Eleventh furnishes no shield. That principle was settled by *Ex Parte Young*, 209 U.S. 123, and has been reaffirmed, in this very context, by a host of recent decisions.[38]

[38] *E.g.*, *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42 (E.D. La.), affirmed, 365 U.S. 569; *Orleans Parish School Board* v. *Bush*, 242 F. 2d 156 (C.A. 5); *School Board* v. *Allen*, 248 F. 2d 59 (C.A. 4), certiorari denied, 353 U.S. 911. The principle is, of course, assumed in this Court's decisions in *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, and *Cooper* v. *Aaron*, 358 U.S. 1.

There is nothing in the relief presently sought against these officers which requires a departure from the usual rule. They would be enjoined from expending State funds on a discriminatory basis.[39] That is undeniably an indirect remedy, constrained by the limited powers of the officials joined as defendants.[40] But it is plainly a permissible form of relief, not unlike that often incorporated in the decrees rendered in re-apportionment cases. See, *e.g.*, *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169 (D. Del.), pending on appeal *sub nom. Roman* v. *Sincock*, No. 307, this Term. We reliably assume that Virginia will find a practical means to end what her Chief Justice characterized as a "shameful distinction."[41] See *County School Board of Prince Edward County* v. *Griffin*, *supra*, 133 S.E. 2d at 582 (Memo. 40) (Eggleston, C. J., dissenting).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the

[39] The operation of the public schools of Virginia depends on the receipt of State funds advanced by the State Comptroller. These funds are paid out by the Comptroller only after the State Board of Education approves and the State Superintendent of Schools certifies to him that the recipient school districts are eligible under State law to receive the money. See Va. Code 1950, §§ 22–140.

[40] Compare *Aaron* v. *McKinley*, *supra*; *James* v. *Almond*, *supra*; and *James* v. *Duckworth*, *supra*, where the appropriate officials were enjoined from continuing to withhold funds from the closed schools.

[41] The Governor of Virginia has publicly stated that *the State* will comply with any ruling rendered by this Court.

cause remanded to the district court for the entry of a decree in accordance with the suggestions outlined above.

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MARCH 1964.

APPENDIX

Virginia School Laws

Inasmuch as the history and interpretation of the constitution and laws of the State of Virginia have played a significant part in the deliberations of the various courts which have considered this case or some phase thereof, it seems pertinent here to discuss certain of these constitutional provisions and laws.

1. The Supreme Court of Virginia has observed that the public school system in Virginia has been in existence for about 100 years.[1] *Board of Supervisors of Chesterfield County, et al.* v. *County School Board of Chesterfield County,* 182 Va. 266, 28 S.E. 2d 698. The court there recounted the early history as follows (182 Va. at 268–269, 275):

> Under the Code of 1849 a public free school system was allowed to be set up in each county after a vote of the people and when two-thirds of the voters had voted in favor of such a system. The School Commissioners were elected by the people and were to be a body corporate and should have 'general control of school funds and schools.'
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> They were required to report to the County Court the amount deemed necessary, and the Court was to lay a levy to provide the amount requested.

[1] Actually, the history of public education in Virginia goes back to January 1, 1797, the effective date of "An Act to establish Public Schools" passed on December 22, 1796. This Act authorized the elected aldermen of each county to build a school house and provide three years of tuition gratis for each child, the funds to be derived from county taxes.

> The system set up under the Code of 1849 remained substantially in effect till the law was materially changed by the legislature of 1869–70. At this time a truly public school system was established.
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> * * * * *
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> Throughout the history of the public school system in Virginia, the authority to lay local taxes for schools has been placed first in the county court and then in its successor, the board of supervisors. Except for the raising of local taxes for schools, both historically and under our present laws, the boards of supervisors are not charged by law with the establishment, maintenance and operation of the public school system.
>
> From the beginning the school boards have been made bodies corporate. They have been given the responsibility by law of establishing, maintaining and operating the school system, along with the State Board of Education, Superintendent of Public Instruction and the Division Superintendent of Schools.

A constitution subsequently adopted in 1869, in compliance with the conditions laid down for the admission of Virginia to representation in the Congress of the United States, provided that

> SEC. 3. The general assembly shall provide by law, at its first session under this constitution, a uniform system of public free schools, and for its gradual, equal, and full introduction into all of counties of the state by the year 1876, or as much earlier as practicable.

On January 26, 1870, the President approved an act passed by the Congress of the United States admitting the State of Virginia to representation in the Congress and approving the aforesaid constitution, upon the following restrictions and conditions, among others:

> Third. That the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States, of the school rights and privileges secured by the constitution of said State.

The General Assembly responded promptly to the constitutional directive in the Acts 1869–70, c. 259, § 67, p. 417, so that the third edition of the Virginia Code, published in 1873, contains chapter LXXVIII, "Of Public Free Schools for Counties, and of the Literary Fund," section one of which states "there shall be established and maintained in this state a uniform system of public free schools." Funds for the establishment, support and maintenance of public free schools were derived from both State and county sources (sections 66–67) and although section 57 prohibited payment of State funds for any school which was not open for at least five months during the year, it also provided that in case of "unavoidable discontinuance" of a school short of the minimum period the board of education could relax the requirement and decide the case on its merits.

2. The voters of the State of Virginia adopted a new constitution in 1902, Article IX, section 129 of which reiterated that "the General Assembly shall establish and maintain an efficient system of public free schools throughout the State." Section 135 of the Constitution commands the Assembly to "apply" certain monies for educational purposes. And Va. Code 1950 § 22–116 declares that the funds "applicable * * * to the establishment, support and maintenance of public schools in the Commonwealth shall consist of" State funds derived from interest on the Literary Fund, General Assembly appropriations, a portion of the Constitutional Capitation tax, other State taxes, and local funds appropriated by local

governmental units. See also Va. Code 1950 § 22–119; 22–119.1 (as amended 1952). These State monies are apparently paid over to local school systems automatically when certain conditions are met. See Va. Code 1950, as amended, § 22–117. Va. Code 1950 § 22–2 provides that "The public free school system shall be administered by a State Board of Education, * * * a Superintendent of Public Instruction, division superintendents of schools, and county and city school boards."[2]

The State Board of Education is responsible for dividing the State "into appropriate school divisions," Va. Code 1950 § 22–30, and for prescribing the qualifications for division superintendents, Va. Code 1950 § 22–31, who are to be appointed by the local school boards, Va. Code 1950 § 22–32, from a list of eligible persons certified by the State Board, Va. Code 1950, as amended (1962 Supp.) § 22–32, and who receive a salary not less than a minimum set by State law, Va. Code 1950, as amended (1962 Supp.), of which amount "the State shall contribute sixty percent, * * *." *Ibid.*

The State Board also prescribes rules and regulations governing the conduct of high schools, as well as requirements for admission, and the conditions on which properly prepared pupils may attend such schools. Va. Code 1950 § 22–191. It examines (Va.

[2] While under Va. Code 1950 § 22-5 the county school boards are merely "empowered" to "maintain the public free schools" of the counties, under Va. Code 1950 § 22-21 the State Board of Education is "authorized and required to do all things necessary to stimulate and encourage local supervisory activities and interest in the improvement of the elementary and secondary schools * * *." The Board of Education, the Superintendent of Public Instruction, and the local school boards were held to be state agencies in *County School Board of Prince Edward* v. *Griffin*, — Va. —, 133 S.E. 2d 565, 577.

Code § 22–202) and certifies teachers (Va. Code 1950 § 22–204);[3] it "is authorized and directed to adopt rules and regulations governing the purchase of textbooks, adopted by it for use in the public schools * * *," (Va. Code 1950 § 22–295); and it shall select textbooks * * * for use in the public schools of the State, exercising such discretion as it may see fit in the selection of books suitable for the schools in the cities and counties respectively." Va. Code 1950 § 22–296. See also, generally, Va. Code 1950 (1962 Supp. § 22–146.1 *et seq.*; 22.166.1 *et seq.*

The Superintendent of Public Instruction is appointed by the Governor, Va. Code 1950 § 22–22, and is charged with formulating "such rules and regulations," and providing "such assistance * * * as shall be necessary for the proper and uniform enforcement of the provisions of the school law in cooperation with the local school authorities." Va Code 1950 § 22–25.

In addition to all this, local school boards are regulated to a great extent by State law (see Va. Code 1950 § 22–45 *et seq.*), including salary limitations for local board members (Va. Code 1950 § 22–67.2). State law specifies what subjects shall be taught in the elementary grades. Va. Code 1950 § 22–233 to 22–238.

3. Following the May 17, 1954, decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483, the Supreme Court of Virginia considered the validity of an item in the Appropriation Act of 1954 (Item 210, Acts of Assembly 1954, ch. 708, p. 970) making available money for orphans of war veterans to pay their tuition and other school expenses at any approved educational or training institution of col-

[3] Subject to some exceptions, local school boards may employ as teachers only persons certified by the State Board. Va. Code 1950 § 22–204.

legiate or secondary grade in the State of Virginia.[4] Section 141 of the Virginia Constitution at that time provided that "no appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof." The decision of the Supreme Court of Virginia, handed down on November 7, 1955, is reported as *Almond* v. *Day*, 197 Va. 419, 89 S.E. 2d 851 and it was there held (197 Va. at 424, 427, 428, 431):

> Section 141 is found in Article IX of our Constitution embracing the provisions for "Education and Public Instruction." Section 129, the first of these provisions, provides that "The General Assembly shall establish and maintain an efficient system of public free schools throughout the State." The other sections in Article IX make provision for the establishment and maintenance of such system. Among these is Section 141 which insures that public funds raised by taxation will be under the exclusive control of public authorities, used for the benefit of the public schools, and that no part thereof will be diverted from that purpose to private schools.
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> * * * Assuming, but not deciding, the soundness of the view that the private institutions involved receive no direct benefit from the transportation of pupils or the furnishing of textbooks to them, the same cannot be said of provisions for the payment of tuition and insti-

[4] This was the outgrowth of a 1930 Act providing for the payment of certain expenses (not including tuition) of war orphans at state institutions. The Appropriation Act of 1932 (Acts 1932, ch. 147, p. 193) broadened this to any approved educational institution in the state and the 1950 Appropriation Act (Acts 1950, ch. 578, p. 1377) enlarged it to provide also for the payment of tuition.

tutional fees at such schools. Tuition and institutional fees go directly to the institution and are its very life blood. Such items are the main support of private schools which are not sufficiently endowed to insure their maintenance. Surely a payment by the State of the tuition and fees of the pupils of a private school begun on the strength of a contract by the State to do so would be an appropriation to that school.

* * * * *

When we consider the natural, reasonable and realistic effect of the provision in Item 210 for the payment of tuition, institutional fees and other designated expenses of eligible children who attend private schools approved by the Superintendent of Public Instruction, we are forced to the conclusion that it constitutes a direct and substantial aid to such institutions and falls within the prohibition of Section 141 of our Constitution.

We further agree with the position of counsel for the respondent State Comptroller that in so far as Item 210 purports to authorize payments for tuition, institutional fees and other designated expenses of eligible children who attend *sectarian* schools, it falls within the prohibitions of Sections 16, 58 and 67 of the Constitution of Virginia and the First and Fourteenth Amendments to the Federal Constitution.

* * * * *

To sustain the validity of Item 210, in so far as it purports to authorize payments for tuition, institutional fees and other designated expenses of eligible children who attend private schools, in the face of the constitutional provisions which have been discussed, would mean that by like appropriations the General Assembly might divert public funds to the support of a system of private schools which the Constitution now forbids. If that be a desir-

able end, it should be accomplished by amending our Constitution in the manner therein provided.

4. On March 7, 1956, section 141 of the Virginia Constitution was amended by adding to it the following proviso:

> * * * provided, first, that the General Assembly may, and the governing bodies of the several counties, cities and towns may, subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning, in addition to those owned or exclusively controlled by the State or any such county, city or town.

5. That same year, 1956, the General Assembly of Virginia met in extra session and enacted several statutes which were subsequently described by the Supreme Court of Virginia in *Harrison* v. *Day*, 200 Va. 439, 106 S.E. 2d 636, in these terms (200 Va. at 442–443):[5]

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[5] Other related legislation passed at the 1956 Extra Session but not mentioned by the court in *Harrison* included an amendment to the Virginia Supplement Retirement Act (Code of Va. (1950 ed.) 51–111.9 *et seq.* (1962 Supp.)) so as to include within its retirement benefits, theretofore restricted to public school teachers and other state employees, teachers in private elementary and secondary schools incorporated after December 29, 1956. Code of Va. (1950 ed.) 51–111.38 (1962 Supp.). Teachers who formerly taught in public schools retain their benefits accrued during such public school service. Code of Va. (1950 ed.) 51–111.41 (1962 Supp.). In the 1956 extra session the legislature also repealed section 125 of title 22, which permitted 20% of the qualified voters to petition for election when the board of supervisors refused to make a levy requested by the school board, to determine whether a levy in lieu

> It will be observed that the stated purpose of the plan embodied in these acts is to prevent the enrollment and instruction of white and colored children in the same public schools. To that end, all elementary and secondary public schools in which both white and colored children are enrolled are, upon the happening of that event, automatically closed, removed from the public school system, and placed under the control of the Governor. All State appropriations for the support and maintenance of such schools are cut off and withheld from them. Such State funds so withheld, and certain other funds raised by local levies, are to be used for the payment of tuition grants for the education in nonsectarian private schools of children who have been attending such public schools, who cannot be assigned to other public schools, and whose parents or custodians desire that they do not attend schools in which both white and colored children are enrolled and taught. Schools which may be policed under federal authority, or disturbed by such policing, are, upon the happening of that event, likewise automatically closed, and under related statutes, tuition grants are made available for pupils who have been attending such schools.

In *Harrison* v. *Day, supra,* decided January 19, 1959, the court invalidated the 1956 legislation, holding (200 Va. at 450–451, 452–453):

> Clearly, the language of Section 141, as amended, contemplates that if State funds are to be devoted to the education of Virginia students in nonsectarian private schools, the General Assembly should make the necessary ap-

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of that authorized should be made; and section 126 of title 22 was amended so that a school tax of less than 50 cents per 100 dollars of the assessed value of property could be levied by the board of supervisors (previously there was a minimum levy of 50 cents per 100 dollars).

propriation therefor. The purposes of Section 141 may not be accomplished at the expense of some public free schools by withholding State funds from their support, and devoting such funds to the payment of tuition grants, as is attempted under the provisions of the Appropriation Act of 1958. (Acts 1958, ch. 642, p. 989).

This device leaves such schools from which the supporting funds are withheld and diverted entirely without the State support required by Section 129 of the Constitution. That section requires the State to "*maintain* an efficient system of public free schools *throughout the State.*" (Emphasis added.) That means that the State must support such public free schools in the State as are necessary to an efficient system, including those in which the pupils of both races are compelled to be enrolled and taught together, however unfortunate that situation may be.

It follows, then, that the provisions of the Act of 1956, Ex. Sess., ch. 68, p. 69 (Code, 1958 Cum. Supp. § 22–188.3 ff.), and the provisions of the Appropriation Act of 1958, ch. 642, p. 989, violate Section 129 of the Constitution in that they remove from the public school system any schools in which pupils of the two races are mixed, and make no provision for their support and maintenance as a part of the system.

It is argued that the closing of schools under these provisions is merely temporary. But the acts do not so provide, and the fact that provision is attempted to be made for the education in private schools of children who have been attending these interrupted schools indicates that the condition may be prolonged. Indeed, it is a matter of common knowledge that under the provisions of these acts a number of schools in several localities in the State have been closed for months.

* * * * *

We find no constitutional objection to the prescribed procedure for making tuition grants out of funds properly available for the purpose. Section 141 of the Constitution, as amended, authorizing State and local appropriations for this purpose places no restriction on the manner in which this is to be done, thus leaving it to the discretion of the General Assembly.

6. The General Assembly met in extra session beginning January 28, 1959, in an apparent effort to salvage what remained of the 1956 "plan." Chapter 1, H.B. 2, was passed on January 31, 1959, amending certain of the 1956 statutes. The most significant of these changes was made in 22–115.12, which was changed to provide that payments of tuition grants shall be made "to parents, guardians, or other custodians of children whose parents, guardians, or custodians make affidavit, and establish to the satisfaction of the local school board, that there is no adequate public school available for the child to attend, or that the welfare of the child would be best served if he attended a school other than the public school at which he would normally attend, or that the child, his parents, guardian or custodian object upon grounds deemed valid and reasonable by the local school board to such child's attendance at the public school to which he has been or normally would be assigned." Other changes were of an administrative nature and the only one of any significance permitted the tuition grant money to be used for children being educated in public schools of other localities. 22–115.15, which provided that "payments for grants under the provisions of this statute should be considered in the distribution of State funds allocated and proportioned for such purposes as though such expenditures were made by the locality for operation and maintenance of the public schools," was repealed.

7. Subsequently, the Perrow Commission delivered its report calling for the complete repeal of the massive resistance legislation and introducing a plan based on "freedom of choice" scholarships to permit private nonsectarian schools to operate in addition to and in place of the public schools. In response, the General Assembly in April 1959 enacted a new tuition grant scheme, repealing the remainder of the 1956 legislation and also repealing H.R. 2 passed on January 31, 1959. Inasmuch as the 1959 tuition grant scheme was replaced by another similar scheme in 1960, described below in the words of the Supreme Court of Virginia in *County School Board of Prince Edward County* v. *Griffin, supra,* there is no purpose here in describing it in detail. Suffice it to say that the 1959 legislation provided a plan of tuition grant "scholarships" for children attending private nonsectarian schools, the money for such scholarships to be derived from both State and local sources but not from funds set aside for public schools. Related legislation passed at the same time in the 1959 Extra Session included repeal of the compulsory attendance laws (Code of Virginia (1950 ed.) 22–251 to 22–275) and their replacement by the same laws on a "local option" basis (*Id.,* 22–275.1 to 22–275.22 (1962 Supp.)); school bus transportation for children attending nonsectarian private schools or financial assistance to the parents of such children in lieu of such transportation (*Id.,* 22–294.1 to 22–294.3 (1962 Supp.)); permitting State teacher education scholarships to be repaid by teaching one year in a nonsectarian private school* (*Id.,* 23–28 (1962 Supp.)); and providing for a referendum to sell school property "no longer

* Formerly such scholarships could be repaid by teaching in a *public* school only.

needed for public purposes" (*Id.*, 22–161.1–161.5 (1962 Supp.)). At this time the General Assembly also amended, added or repealed a number of statutory provisions dealing with the financing of schools so that a local tax-levying body did not have to appropriate money for schools, even if they levied a property tax; local school boards had to prepare two budgets, one for schools, the other for "educational purposes"; and funds derived from a property tax levy could be appropriated for schools or tuition grant "scholarships", or both (Acts, 1959 Ex. Sess., ch. 52, 69, 79 and see Code of Virginia (1950 ed.) 22–117 *et seq.* (1962 Supp.)).

As stated above, the Supreme Court of Virginia has described the present tuition grant plan, enacted at the 1960 session of the General Assembly, in its opinion in *County School Board of Prince Edward County* v. *Griffin, supra,* 133 S.E. 2d at 579, as follows:

> The present tuition grants law was enacted by the General Assembly by Acts 1960, ch. 448, p. 703, now codified as §§ 22–115.29 through 22–115.35. These sections provide for the granting of State and local scholarships without reference to race or creed. Section 22–115.30 provides:
>
> "Every child in this Commonwealth between the ages of six and twenty who has not finished or graduated from high school, and who desires to attend a nonsectarian private school located in or outside, or a public school located outside, the locality in which such child resides, shall be eligible and entitled to receive a State scholarship in the amount of one hundred and twenty-five dollars per school year, if attending an elementary school and one hundred fifty dollars if attending a high school."
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> Section 22–115.31 authorizes localities to provide local scholarships, for the education of

children residing therein, in nonsectarian private schools located in or outside, and in public schools located outside, the locality.

Section 22–115.32 makes every child between six and twenty years of age residing in the locality who has not finished high school eligible for such local scholarships.

Section 22–115.34 provides that if the locality fails to provide such scholarships, the State Board of Education may direct the Superintendent of Public Instruction to do so, and the amount thereof shall be deducted from other State funds appropriated to such locality, but not from any funds to which the locality is entitled as welfare funds or for the operation of public schools.

We perceive nothing in or out of the statutes to render these scholarships unavailable to any eligible child in Prince Edward county whether public free schools are operated in the county or not.

In that opinion the court also summarized what it described as the sections of the present Virginia Constitution dealing with money and other matters of operation of the public school system (133 S.E. 2d at 574):

Section 134 established the literary fund and it was amended in 1944 to empower the General Assembly to set aside parts thereof above ten million dollars for public school purposes.

Section 135 required the General Assembly to apply to the schools of the primary and grammar grades (generally accepted as meaning the grades below high school) the constitutional minimum funds above referred to. It then permitted the General Assembly to make such other appropriations for school purposes "as it may deem best."

Then § 136 authorized each school district to raise additional sums by a tax on property, to be apportioned and expended by the local school

authority *"in establishing and maintaining such schools as in their judgment the public welfare may require* (emphasis added);" provided that the primary schools so established must be maintained at least four months before any of the money can be used to establish schools of higher grade.

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